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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H_____ L_____, etc.,

Appellant,

v.

SCOTT M. MATHESON, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR APPELLANT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5903

H_____ L_____, on behalf of herself and all others similarly situated,

Appellant,

v.

HONORABLE SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah, and HONORABLE ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah,

Respondents.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Utah (A. 47) is reported at 604 P.2d 907 (Utah 1979). The opinion of the District Court (A. 13) is not reported.

JURISDICTION

The opinion of the Supreme Court of the State of Utah was published on December 6, 1979. (A. 47) Notice of appeal to this Court was filed on the 26th day of December, 1979. (Appendix B to the Jurisdictional Statement) The jurisdiction of this Court is invoked pursuant to the provisions of Section 1257(2) of Title 28 United States Code and probable jurisdiction was noted by this Court on February 25, 1980. (A. 60)

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

1. Section 1, Fourteenth Amendment to the Constitution of the United States of America:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Section 76-7-304(2) Utah Code Annotated 1953:

> "To enable the physician to exercise his best medical judgment, he shall: . . . (2) notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed if she is a minor or the husband of the woman, if she is married." (Vol. 8B, Utah Code Annotated, 1953, P. 162)

3. Section 76-7-314(3) Utah Code Annotated, 1953:

"A violation of any other provision in this act [part] is a class A misdemeanor." (Vol. 8B, Utah Code Annotated, 1953, P. 164)

4. Section 76-3-204(1) Utah Code Annotated, 1953:

"A person who has been convicted of a misdemeanor may be sentenced to imprisonment as follows: (1) In the case of a class A misdemeanor, for a term not exceeding one year; . . ." (Vol. 8B, Utah Code Annotated, 1953, P. 53)

5. Section 76-3-301(3) Utah Code Annotated, 1953:

"A person who has been convicted of an offense may be sentenced to pay a fine not exceeding: . . . (3) $1,000 when the conviction is of a class A misdemeanor; . . ." (Vol. 8B, Utah Code Annotated, 1953, P. 57-58)

QUESTION PRESENTED FOR REVIEW

DO THE PROVISIONS OF SECTION 76-7-304(2) UTAH CODE ANNOTATED, 1953, WHICH REQUIRE THROUGH THE IMPOSITION OF CRIMINAL SANCTIONS A PHYSICIAN IN THE STATE OF UTAH, PRIOR TO PERFORMING AN ABORTION ON A MINOR, REGARDLESS OF THE DESIRES OF THE MINOR, THE TRIMESTER OF THE MINOR'S PREGNANCY, OR THE MEDICAL JUDGMENT OF THE TREATING PHYSICIAN, TO NOTIFY, IF PHYSICALLY POSSIBLE, THE PARENTS OF THE MINOR, VIOLATE THE MINOR'S RIGHT OF PRIVACY WHICH ENCOMPASSES HER RIGHT TO SECURE AN ABORTION WITHOUT UNWARRANTED INTERFERENCE BY

THE STATE AND HER RIGHT TO A DOCTOR-PATIENT RELATIONSHIP FREE OF IMPROPER REGULATION BY THE STATE IN CONTRAVENTION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

STATEMENT OF THE CASE

This action presents a challenge to the validity under the Fourteenth Amendment to the Constitution of the United States of America to Section 76-7-304(2) Utah Code Annotated 1953 which requires under threat of criminal penalty, a physician in the State of Utah treating a pregnant minor to notify, if physically possible, the parents of that woman before performing an abortion upon her. (A. 47-48) The appellant asserts this statute effects an unwarranted restriction on her exercise of her fundamental right to privacy, that is, to secure an abortioin free of undue regulation by the State and is thus unconstitutional. (A.3-7)

The appellant, a fifteen-year olf unmarried minor, resident of the State of Utah, was residing in the home of her parents when she learned that she was in her first trimester of an undesired pregnancy. (A. 3-5, 24-27) In consultation with both her physician and social worker, she determined that it was in her best medical interest that she be aborted and that her parents not be notified of either her decision or its implementation. (A. 3-5, 24-27) She was also informed that her physician was unwilling to perform the abortion without notifying her parents of her condition and decision though such action was contrary to his best

medical judgment as to appropriate treatment because the provisions of Section 76-7-304(2), Utah Code Annotated 1953, in combination with the provision of Section 76-7-314(3), 76-3-204(1), and 76-3-301(3) Utah Code Annotated 1953 imposed criminal sanctions upon him if he performed the abortion upon appellant without providing the specified parental notification. (A. 3-5, 24-27) Since she did not want to notify her parents of her condition or decision, appellant instituted an action in the Courts of Utah to secure either a construction of Section 76-7-304(2) Utah Code Annotated 1953, that would allow her physician to exercise his best medical judgment and abort her without notifying her parents or an invalidation of that statute. (A. 3-7, 24-27)

The Trial Court construed the statute as requiring appellant's physician to notify her parents before providing the medical care desired by her and deemed necessary medical care by her physician if they could be located and it was possible to do so; he then held that the statute as thus construed was constitutionally valid. (A. 13-14) The judge ruled that if appellant's parents could be located and notified, any special circumstances as might exist which would form the basis for a determination by appellant, her counselor and her physician that her parents should not be notified, would become irrelevant and could not justify an abortion without parental notification. (A. 27-37) Finally, the judge determine that appellant was capable of pursuing this action without the appointment of a guardian ad litem and certified her as the appropriate representative of a class comprised of all pregnant minors similarly situated. (A. 41, 43)

The construction of Section 76-7-304(2) Utah Code Annotated 1953 made by the Trial Court and the

determination that the statute as thus construed was constitutionally valid were affirmed by the Supreme Court of the State of Utah (A. 47-58), 604 P.2d at 908, on the rationale that the opinion of Mr. Justice Powell in *Bellotti v. Baird*, _____ U.S. _____ (1979), was the opinion of only four members of this Court and was thus not binding upon the State of Utah. 604 P.2d at 912 (A. 56) By this appeal, that ruling is challenged by appellant.

ARGUMENT

POINT ONE

THE UTAH STATUTE WHICH REQUIRES A PHYSICIAN UNDER THREAT OF CRIMINAL SANCTION TO NOTIFY, IF IT IS PHYSICALLY POSSIBLE TO DO SO, THE PARENTS OF A PREGNANT MINOR PRIOR TO PERFORMING AN ABORTION UPON THAT MINOR VIOLATES THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES BY IMPROPERLY REGULATING AND INFRINGING UPON THE EXERCISE OF THE CONSTITUTIONALLY PROTECTED RIGHT OF PRIVACY OF SAID MINOR.

Appellant, a minor in her first trimester of pregnancy, (A. 4, 24-26) is entitled to the protection of the Fourteenth Amendment guarantee of her right of privacy, which encompasses her right to obtain an abortion free from unwarranted regulation by the State of Utah. *Bellotti v. Baird*, _____ U.S. _____ (1979), *Planned Parenthood of*

Central Missouri v. Danforth, 428 U.S. 52, 74-75 (1976), *Roe v. Wade*, 410 U.S. 113 (1973). The regulation of the exercise of this fundamental right by the State of Utah through enactment and enforcement of Section 76-6-304(2) Utah Code Annotated 1953, is an unwarranted infringement and burden upon the exercise of this constitutionally protected right. The challenged statute which requires the treating physician in Utah to notify, if physically possible, the parents of *all* minors in Utah before aborting them regardless of the desires of the woman, the circumstances in which she finds herself, the trimester of pregnancy or the best medical judgment of the treating physician creates an overbroad, all-inclusive impediment to the exercise of a fundamental right protected by the Constitution of the United States and is thus invalid under the provisions of the Fourteenth Amendment. *Bellotti v. Baird, supra*,[1] *Roe v. Wade, supra.*

The sole basis for any question regarding appellant's challenge to Section 76-7-304(2) Utah Code Annotated 1953, is that it presents the issues inherent in the intersection of three areas of interest which this Court has declared are protected by the Constitution. These are the rights of a minor, her family and the State. The opinion of Justice Powell, speaking for himself, the Chief Justice, Justice Stewart, and Justice Rehnquist in part II of *Bellotti II*, _____ U.S. at _____ (Slip opinion 10-16) articulated the boundaries and proper resolution of those interests. See also *Wynn v. Carey*, 582 F.2d 1375, 1383-1389 (7th Cir. 1978) The particular issue presented to the Court by this case was framed by Justice Powell:

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[1]The decision of this Court in *Bellotti v. Baird*, ____ U.S. ____ (1979) will hereafter be referred to as *Bellotti II.*

> "But we are concerned here with the constitutional right to seek an abortion. The abortion decision differs in important ways from other decisions that may be made during minority. The need to preserve the constitutional right and the unique nature of the abortion decision, especially when made by a minor, require the State to act with particular sensitivity when it legislates to foster parental involvement in this matter."

_____ U.S. at _____ (Slip opinion 18-19)

This guidance was rejected by Utah and that action requires this Court to invalidate the offending statute. Section 76-7-304(2), Utah Code Annotated 1953 is not sensitive or discrete. It requires the notification of the parents of *all* minors in Utah by the treating physician of the minor's condition and proposed action. (A. 47) It substitutes the judgment of the State for that of the treating physician and the pregnant minor and rejects the exceptions to State regulation recognized by this Court, that is, the mature minor capable of making her own decision without parental involvement, *Bellotti II*, _____ U.S. at _____ (Slip opinion 24-25, 27-28) and where the best interests of the minor are served by her being aborted without parental involvement. *Bellotti II*, _____ U.S. at _____ (Slip opinion 24-25).

Section 76-7-304(2) Utah Code Annotated 1953 as constructed by the Supreme Court of Utah not only rejects the instruction of Mr. Justice Powell, it also ignores the concerns of Justices Brennan, Marshall and Blackmun articulated by Mr. Justice Stevens:

> ". . . The constitutional right to make the abortion decision affords protection to both of the privacy interests recognized in this Court's cases: "One is the individual's interest in avoiding disclosure of personal matters, and another is the interest in independence in

> making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600. It is inheent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties."

Bellotti II, _____ U.S. at _____ (Slip opinion, Concurring 3).

This Court in ruling unconstitutional the Massachusetts statute evaluated in *Bellotti II* established the rule that a statute effectuating a regulation binding in *all* abortion cases creates an overbroad regulation on the exercise of a constitutionally protected right of privacy of a minor in that State. Any compelling State interest which might be reflected in a carefully drawn statute is clearly absent from Section 76-7-304(2) Utah Code Annotated 1953, which, as construed by the Supreme Court of Utah, requires parental notification in all cases. Not only does it thus create an impermissible burden on the exercise of constitutionally protected rights of a pregnant minor in Utah, it completely overrides and negates the best medical judgment of her treating physician. Thus, as in the case of appellant, where the treating physician in the exercise of his best medical judgment believes his patient should be aborted without parental involvement, his medical judgment is overriden by the statute. If he exercises his best medical judgment he faces criminal sanctions. This over regulation could not be more clear.

In the Courts below appellees have asserted that the challenged statute is a regulation properly enacted by the State of Utah to protect the State's interest in compelling family consultation in mattters so serious as an abortion decision. The courts which have considered this question (except the Utah Supreme Court) have all ruled that such an all encompassing statute cannot be based on this foundation.

Bellotti II, supra, (Slip opinion 10-16, 24-25, 27-28), *Wynn v. Carey*, 582 F.2d 1375, 1383-1390 (7th Cir., 1978), *Margaret S. v. Edwards*, _____ F.Supp. _____ (E.D.La., 1980) (Judge Collins, Civil Action No. 78-2765, opinion at PP 21-27), *Akron Center for Reproductive Health Inc. v. City of Akron*, 479 F.Supp. 1172, 1201-02 (N.D. Ohio 1979), *Women's Community Health Center, Inc. v. Cohen*, 477 F.Supp. 542, 548-48 (D.Main 1979), *Baird v. Bellotti*, 450 F.Supp. 997, 1000-1003 (D.Mass. 1978); cf. *Doe v. Irwin*, _____ F.2d _____ 48 U.S.L.W. 2587 (6th Cir. 1980). This Court declared such all inclusive regulation was void as failing to recognize exceptions constitutionally required for the mature minor and the minor whose best interest requires parental exclusion. *Bellotti II*, _____ U.S. at _____ (Slip opinion 24-25, 27-28).

The statute itself demonstrates this assertion is an afterthought. It states *nothing* about protecting family interests. It provides that it is enacted to enable the treating physician to ". . . exercise his best medical judgment," Section 76-7-304 Utah Code Annotated 1953, and it is located in the Criminal Code of the State of Utah, not in the medical license or family law statutes.

If, however, the statute is considered (despite its provisions and location) to be an attempt by the State of Utah, to protect the family, or to advance the interests of the State by protecting the family, it is too broad and unnecessary.

> "Ostensibly, the notice requirement furthers the State's interest in insuring that parents are given the opportunity to participate in an important and potentially traumatic decision in the life of their minor daughter, thus promoting family dialogue and harmony. However, any state interest in encouraging consultation between the daughter who is seeking an abortion and her parents is not necessarily achieved by the notice

> requirement because merely giving notice to the parents does not assure that there will be any meaningful dialogue. In many cases the notice requirement will cause family disharmony because it will inform parents who may oppose their daughter obtaining an abortion, yet, those parents will be legally powerless to prevent their daughter from obtainin an abortion."

Margaret S. v. Edwards, _____ F. Supp. at _____ (Opinion 24-25).

In those families enjoying good parent-child relationships, such State interference is unnecessary as well as unconstitutional. It is in those families where a pregnant minor correctly fears that parental notification is not in her best interest that protection of her constitutional interests require invalidation of the infringment on the exercise of a constitutionally protected right effectuated by the challenged statute. Such a minor is injured by the statute which does not protect either her or the family:

> ". . . there are a variety of recognized reasons why it would be to a minor's best interests for one or both of her parents to be kept in ignorance of her pregnancy. Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions."

Baird v. Bellotti, 450 F. Supp. 997, 1001 (D.Mass. 1978). See also *Baird v. Bellotti*, 393 F.Supp. 847, 850 (D.Mass. 1975).

This is not a hypothetical discussion; the cases arising under Section 76-7-304(2) Utah Code Annotated 1953 as well as those arising in other jurisdictions, *Bellotti II, Wynn v. Carey, supra, Margaret S. v. Edwards, supra, Akron Center for Reproductive Health, Inc. v. City of Akron, supra,* and *Women's Community Health Center, Inc. v. Cohen, supra,* demonstrate the scope of the problem. In the instant matter, the plaintiff is a minor who was residing with her parents when she discovered her condition. (A. 3-5, 24-26) She did not wish her parents to be notified of her condition or decision.[2] (A. 3-5, 24-26) The Utah statute challenged in this appeal prohibited appellant's physician from performing an abortion upon her without notifying her parents despite the fact that both he and the social worker with whom appellant consulted believed her parents should not be notified of her condition, decision or proposed treatment. (A. 3-5, 24-26) Thus appellant's belief and desires were supported by the professional judgment of her physician yet he was prevented from exercising his best medical judgment by the challenged act. Not only did Section 76-7-304 Utah Code Annotated 1953, impinge on appellant's exercise of her constitutional right of privacy, it prevented the effectuation of the best medical judgment of her treating physician.

This same statute prohibited the plaintiff in the case *L_____ R_____ v. Hansen*, (Civil No. C-80-0078J) currently pending in the United States District Court for the

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[2]In this regard, her situation is identical to the plaintiff Mary Moe whose case was considered by this Court in *Bellotti II*____ U.S. at____ (Slip opinion P. 3).

District of Utah, from securing an abortion without prior notification of her parents. (Appendix to Brief 1-6) L_____ R_____ is a 17-year old woman who had been residing on her own for approximately one year prior to the filing of the action challenging Section 76-7-304(2) Utah Code Annotated 1953. She had been asked to leave the home of her mother, had done so and been completely self-supporting and managing her own affairs during that year. She desired to obtain an abortion without her parents being notified because she believed that if she did inform her parents of her condition and her decision, it would cause a deterioration in the relationship with her parents which she did not wish to occur. (Appendix to Brief 4-5). She was compelled to go to court to challenge the Utah act to obtain what the Constitution of the United States guaranteed that she should have, that is, an abortion without the notification of her parents. (Appendix to Brief 1-6) Judge Jenkins found her to be a mature minor, competent to make her own decision, possessed of the ability to proceed on her own, yet she could not exercise her right to proceed on her own absent the injunction to the statute which he granted. (Appendix to Brief 1-2, 5-6).

The Utah statute challenged in the instant action had equal application to a mature minor living on her own who had been managing her own affairs for a year and an unmarried minor residing at home with her parents whose physician and social worker believed in the exercise of their best professional judgment should be aborted without notification of her parents. Each of these women had consulted with their treating physician, determined that if was in their best medical interest to obtain an abortion without the involvement of their parents, yet neither could do so because the statute challenged in this action effected an unwarranted

regulation of their constitutional right of privacy. (A. 3-5, 24-26, Appendix to Brief, 1-6). An equally obvious situation would be that of a minor whose pregnancy was the result of an incestual relationship which would be encompassed by Section 76-7-304(2) Utah Code Annotated 1953.

The overbreadth of the Utah statute could not be made more clear. Both H_____ L_____ and L_____ R_____ were determined sufficiently mature to proceed without the appointment of a guardian (A. 41, 43, Appendix to Brief 5), and L_____ R_____ was found mature enough to consent to her own abortion.[3] (Appendix to Brief 5). Despite the competency of each woman, the fact that each was in her first trimester of pregnancy (A. 3-4, 24-26, Appendix to Brief 4), the best professional judgment of the treating professionals, and the fact circumstances of the women, the challenged statute prohibited an abortion absent prior parental notification. In each case, the exercise of the constitutional rights of the woman was unduly burdened by the challenged statute which ignores the analysis and guidance of this Court:

> "The pregnant minor's options are much different from those facing a minor in other situations, such as deciding whether to marry. A minor not permitted to marry before the age of majority is required simply to postpone her decision. She and her intended spouse may preserve the opportunity for later marriage should they continue to desire it. A pregnant adolescent, however, cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.
>
> "Moreover, the potentially severe detriment facing a pregnant woman, see *Roe v. Wade*, 410 U.S. at 153, is not mitigated by her minority. Indeed, considering her

[3]This issue was never reached by Judge Winder regarding H____ L____ because of his ruling regarding the statute.

probable education, employment skills, financial resources, and emotional maturity, unwanted motherhood may be exceptionally burdensome for a minor. In addition, the fact of having a child brings with it adult legal responsibility, for parenthood, like attainment of the age of majority, is one of the traditional criteria for the termination of the legal disabilities of minority. *In sum, there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible.*" (Emphasis added)

_____ U.S. _____ at _____ (Slip opinion 19)

Section 76-7-304(2) Utah Code Annotated 1953 as interpreted by the Supreme Court of the State of Utah, overrides the right of privacy of a pregnant minor in the State of Utah and creates a unwarranted burden upon the exercise of her constitutional right of privacy, that is, to be free to obtain an abortion without undue interference by the State. This unconstitutional regulation must be eliminated by this Court.

POINT TWO

THE UTAH STATUTE WHICH REQUIRES A PHYSICIAN UNDER THREAT OF CRIMINAL PENALTY TO NOTIFY, IF POSSIBLE, THE PARENTS OF A MINOR WHO HAS CONSULTED HIM FOR AN ABORTION PRIOR TO PERFORMING THAT ABORTION IS A REGULATION WHICH IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION UNLAWFULLY IMPINGES ON A MINOR'S RIGHT TO SECURE MEDICALLY NECESSARY TREATMENT

FROM HER TREATING PHYSICIAN WHO, IN THE EXERCISE OF HIS BEST MEDICAL JUDGMENT, DOES NOT BELIEVE SUCH NOTIFICATION SHOULD TAKE PLACE.

This Court ruled that in the first trimester of pregnancy a woman has the right to consult with an attending physician who:

> "... in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State."

Roe v. Wade, 410 U.S. 113 at 163. You went on to hold in the companion case of *Doe v. Bolton,* 410 U.S. 179, 192, (1973), that a doctor in deciding whether or not to perform an abortion must be free to treat his patient through the normal exercise of his best medical judgment and:

> "... the medical judgment may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman." 410 U.S. at 191.

Then, this Court declared that where:

> "The woman's right to receive medical care in accordance with her licensed physician's best medical judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview."

Doe v. Bolton 410 U.S. at 197, the statute imposing such an impediment on and burden to the exercise of the right of privacy was unconstitutional.

The rationale of this rule was restated three years later in *Singleton v. Wulff*, 428 U.S. 106 (1976) when this Court declared:

> "The closeness of the relationship is patent, as it was in *Griswold* and in *Doe*. *A woman cannot safely secure an abortion without the aid of a physician*, . . . The woman's exercise of her right to an abortion, whatever its dimension, is, therefore, necessarily at stake here. Moreover, the constitutionally protected abortion decision is one in which the physicial in intimately involved. See *Roe v. Wade*, 410 U.S. at 153-156, 35 L.Ed.2d 147, 93 S.Ct. 705".

428 U.S. at 117.

This right of a patient to be treated by her physician without an unconstitutional burden being imposed by the State through undue regulation by the State was recently re-examined in *Colautti v. Franklin*, 439 U.S. 379, (1979) where, following up on concepts articulated in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), *Roe v. Wade, supra*, and *Doe v. Bolton, supra*, this Court ruled statutes which unduly regulated the exercise by a physician of his best medical judgment were unconstitutional, 428 U.S. at 63-65.

This Court has consistantly scrutinized with great care those statutes which impose criminal sanctions on a physician for treating his patient in abortion cases where criminal sanctions are imposed on the exercise of his best medical judgment. *Roe v. Wade, supra, Doe v. Bolton, supra, Planned Parenthood of Central Missouri v. Danforth, supra*, and *Colautti v. Franklin, supra*. This is recognition of the pragmatic consideration that the right to an

abortion means nothing if the assistance, guidance and services of a treating physician are taken from the woman seeking to exercise her constitutionally protected right. *Singleton v. Wulff,* 428 U.S. 106 (1976).

The sole basis on which the state might have the right to regulate this relationship is the minority of the members of the class represented by appellant. However, as pointed out in Point I of this Brief, the challenged statute prohibits the exercise of a physician's best medical judgment where he believes in light of all factors that the minor's parental involvement is contrary to her best interest. This regulation is not sensitive, narrow or reflective of the right of privacy of a pregnant minor. It is broad and all-encompassing. It overrides the judgment of the treating physician in all cases including where the mature minor, exercising her constitutional right to an abortion seeks treatment without parental involvement and where the best interest of the minor dictates parental exclusion. *Bellotti II,* ____ U.S. at ____ (Slip Opinion 24-25, 27-28, slip concurring opinion 3).

This prohibition upon an unlawful statutory intrusion on the doctor-patient relationship by the improper regulation of the exercise by a woman of her right of privacy was rejected by the Supreme Court of the State of Utah when it ruled:

> "... the consulting physician must notify the parents, if under the circumstances, in the exercise of reasonable diligence, he can assertain their identity and location and it is feasible or practicable to give them notification. Furthermore, within the context of what is reasonable under the circumstances, the time element is an important factor for there must be sufficient expedition to provide an effective opportunity for an abortion."

604 P.2d at 913 (A. 57-58).

In a case such as that of appellant, where she, her physician and her social work counselor all feel it is contrary

to her best interests to notify her parents of her condition, decision and intended treatment, such regulation by the State upon the exercise by the physician of his best medical judgment is clearly unwarranted. This is equally true for L____ R____ a mature minor judged capable of making her own decision and whose belief is that providing such notice will cause a serious deterioration in the relationship she has with her parents. It would be true for the minor victim of an incestuary relationship who had consulted a physician for an abortion. The challenged statute takes the means of exercising the right to an abortion away from a pregnant minor in Utah; it deprives her of a treating physician.

This unwarranted restriction is effectuated not by inhibiting the minor in exercising her rights, it is imposed by threatening her treating physician with criminal sanctions. It overrides the desires, belief and knowledge of the minor regarding her own best interests and negates the best medical judgment of the treating physician where he believes the abortion should be performed without parental involvement. It makes a physician who this Court has declared must be free to exercise his best medical judgment, *Roe v. Wade, supra, Doe v. Bolton, supra,* disregard his judgment where he believes it is in the best medical interests of his patient not to notify her parents. The Utah statutory scheme provides for no exceptions unless it is physically not possible within the time frame involved to notify the parents of the pregnant minor. This clearly impinges upon the doctor-patient relationship and effectively deprives a minor in the State of Utah seeking an abortion of the sole means that she can legally use to obtain one; that is, her treating physician's services. It is an unconstitutional regulation of constitutionally protected rights which must be invalidated by this Court.

CONCLUSION

The provisions of Section 76-7-304(2) Utah Code Annotated 1953 violate the Fourteenth Amendment to the Constitution of the United States. As construed by the Courts of the State of Utah, the statute unlawfully deprives a pregnant minor in the State of Utah, even in her first trimester of pregnancy, of her right to secure an abortion free from unwarranted State interference. As such, this Court should rule that statute unconstitutional, remand this case to the Supreme Court of the State of Utah with directions to enter judgment in accordance with the opinion of this Court and direct that Court to remand this matter to a Trial Court in the State of Utah for the determination of appropriate costs and attorneys fees under the provisions of Section 1988 of Title 42 United States Code (A. 6-7).

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Appellant

APPENDIX A

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* * * * * * * * *

L____ R____, on behalf of herself and all other persons similarly situated,	
Plaintiff,	ORDER-Filed Feb. 8, 1980
vs.	
ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, and HONORABLE	Civil No. C-80-0078J

SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah,

Defendants.

* * * * * * * *

The above-entitled matter came duly before the above-entitled Court, the Honorable Bruce S. Jenkins presiding, for consideration of the Motion of the plaintiff for the entry of a Temporary Restraining Order and/or Preliminary Injunction on Wednesday, the 6th day of February, 1980. Prior to said hearing, the Court had heard testimony from the plaintiff and now, having heard and considered the arguments of counsel and taken the matter under advisement to review and consider the written authority submitted by counsel for the respective parties, the oral and written arguments of the parties and research regarding the questions presented and having considered the urgency for the plaintiff of rendering an expedited decision, and having previously entered Findings of Fact and Conclusions of Law in this matter:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Defendants, their agents, employees and those working in concert with them and under their direction are hereby ordered enjoined and prohibited from enforcing the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, at this time insofar as they apply to the plaintiff, L____ R____ , and her treating physician.

DATED this 8 day of February, 1980.
BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

/s/ Paul M. Tinker
PAUL M. TINKER
Assistant Attorney General
Attorney for Defendants

APPENDIX B

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

* * * * * * * * *

L____ R____, on behalf of herself and all other persons similarly situated,	)
Plaintiff,	) FINDINGS OF FACT AND
vs.	) CONCLUSIONS OF LAW—
ROBERT B. HANSEN, individually and in his capacity as Attorney General of the State of Utah, and HONORABLE	) Filed Feb. 8, 1980
	) Civil No. C-80-0078J

SCOTT M. MATHESON, individually and in his capacity as Governor of the State of Utah,

Defendants.

* * * * * * * *

The above-entitled matter came duly before the above-entitled Court, the Honorable Bruce S. Jenkins presiding, for consideration of the Motion of the plaintiff for the entry of a Temporary Restraining Order and/or Preliminary Injunction on Wednesday, the 6th day of February, 1980. Prior to said hearing, the Court had heard testimony from the plaintiff and now, having heard and considered the arguments of counsel and taken the matter under advisement to review and consider the written authority submitted by counsel for the respective parties, the oral and written arguments of the parties and research regarding the questions presented and having considered the urgency for the plaintiff of rendering an expedited decision, hereby makes and enters the following:

FINDINGS OF FACT

1. The plaintiff has asserted a claim in this Court challenging the validity of Section 76-7-304(2) Utah Code Annotated, 1953, under the provisions of 28 U.S.C. Section 1343, 42 U.S.C. Section 1983, and the Fourteenth Amendment to the Constitution of the United States.

2. The plaintiff is a resident of the State of Utah, seventeen years old, unmarried and currently in her first trimester of pregnancy.

3. The plaintiff is living by herself, supporting herself and has done so for the last year.

4. The plaintiff left the home of her mother after having been invited to do so and since leaving said home has not been supported by or received any assistance from her mother.

5. The plaintiff's father does not live in the State of Utah and has not provided any support to the plaintiff since she moved from the home of her mother.

6. The plaintiff consulted with her physician, social workers, her attorney and those persons who have a meaningful relationship with her as to her current situation and the alternative courses of action available to her.

7. The plaintiff does not desire to inform or have her parents informed of her current condition or the medical treatment she is seeking as is required by the provisions of Section 76-7-304(2) Utah Code Annotated, 1953.

8. The physician who is currently providing treatment to the plaintiff will not abort her for fear of being prosecuted pursuant to the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, and the concomitant applicable criminal provisions without informing the parents of the plaintiff of the operation which should be performed upon the plaintiff.

9. If the plaintiff informed her mother of her condition or her decision, she believes it could cause a serious deterioration of their relationship.

From the foregoing Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter.

2. The plaintiff is an emancipated minor who is a mature individual who is capable of understanding her condition and making an informed decision which she has done after carefully considering the alternatives available to her and consulting the persons with whom she felt she should consult prior to making the decision to have an abortion.

3. The provisions of Section 76-7-304(2) Utah Code Annotated, 1953, are either unconstitutional as applied to the plaintiff in that they unlawfully infringe upon the exercise of her right of privacy as guaranteed by the Fourteenth Amendment to the Constitution or fail to apply to her as an emancipated minor.

4. It is probable that the plaintiff will be successful in her challenge to the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, either because said statute will be determined unconstitutional as applied to her, a mature and emancipated minor, or because said statute does not apply to a mature emancipated minor.

5. The plaintiff will suffer immediate and irreparable injury if the defendants are not enjoined from enforcing the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, as to the plaintiff.

6. The Court should make no determination at this time as to whether or not this is an appropriate class action and whether or not the plaintiff is an appropriate representative of a potential class.

7. The defendants should be enjoined and prohibited from enforcing the provisions of Section 76-7-304(2) Utah Code Annotated, 1953, at this time insofar as they apply to the plaintiff.

DATED this 8 day of February, 1980.

BY THE COURT:

/s/ Bruce S. Jenkins
BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ David S. Dolowitz
DAVID S. DOLOWITZ
Attorney for Plaintiff

/s/ Paul M. Tinker
PAUL M. TINKER
Assistant Attorney General
Attorney for Defendants